A NEW PHASE OF EQUITABLE ESTOPPEL.

THE first distinctive enunciation of the modern doctrine of equitable estoppel was given by Lord Chief Justice Denham, in 1837, in the well known case of Pickard *v.* Sears,[1] in these words:

"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

This rule, which has since been greatly extended, originated in the court of chancery, but is now generally applied to cases arising in common law courts. While the doctrine is a salutary one, and founded in the main upon equitable principles, it becomes odious when not justly or reasonably applied. Estoppel being a rule of evidence, a cause of action cannot be founded upon it. Although regarded by many as rigorous and inequitable, it has gradually grown into favor since Lord Chief Justice Mansfield in 1762, in Montefiori *v.* Montefiori,[2] impressed it upon our legal system in the following forceful words:

"Where third persons represent anything material, in a light different from the truth, . . . they shall be bound to make good the thing, in the manner in which they represented it. . . . For no man shall set up his own inequity as a defence, any more than as a cause of action."

Not being a cause of action, the measure of damage in the application of this doctrine is not compensation, but the placing of the one relying upon it in the same position as if the representation, or assumed state of facts, were true.

Quite recently an important judgment was delivered in the Supreme Court of Canada, Ewing *v.* Dominion Bank,[3] involving a principle of equitable estoppel, which has elicited much comment, not less among the profession than in commercial circles and banking institutions. Its decision settled, as far as the court of last

[1] 6 Ad. & E. 474. [2] 1 Black. W. 363. [3] 35 Can. Supreme Ct. 133.

resort for the Dominion can settle, a question of considerable importance respecting forged paper discounted by a bank. The judgment cannot be said to be satisfactory for two reasons. First, the court was a divided one, three sustaining the judgment of the inferior court and two dissenting. In the second place, the amount of the judgment assessed for the plaintiff (below), the Dominion Bank, was so manifestly inequitable as to suggest the odium, which Lord Coke designated as attaching to estoppels generally. A somewhat detailed account of the facts of the case is necessary in order to form a just conception of the decision.

The plaintiff is a chartered bank having its head office at Toronto. The defendants, William Ewing & Co., are a well known firm of seed merchants in Montreal. One Wallace, managing clerk of the Thomas Phosphate Co., of Toronto, finding the company in sore need of money, on August 14, 1900, forged the name of William Ewing & Co. to a promissory note for $2,000, at four months, made payable to the Thomas Phosphate Co. at the Dominion Bank, Toronto. Wallace, on August 15th, procured the forged note to be discounted by the said bank, and the proceeds placed to the credit of the company in the bank. On the same day the assistant manager of the bank sent notice to Ewing & Co. that their note for $2,000, in favor of the Thomas Phosphate Co., would fall due on December 17, 1900, and they were requested to provide for the same at maturity. This notice was received by Ewing & Co. on the morning of August 16th. On the 15th, the day of discount, Wallace checked out part of the proceeds, so that at the close of business, on the 15th of August, the Phosphate Co. had at the credit of its account, at the bank, $1,611.65; by the 18th Wallace had drawn all but $70.

Ewing & Co. on receipt of the notice sent them by the bank, on the 16th, at once telegraphed to Wallace, whom they had personally known, asking what the notice meant. On the same day Wallace telegraphed from Boston to Ewing & Co., saying he was coming to Montreal and would explain why the bank held the note. On the 18th, he telegraphed again to Ewing & Co. to arrange to see him on the 19th. On the last named day Wallace reached Montreal, and then made known his forgery of the note, and promised to take steps to retire the same at any early day, and begged of Ewing & Co. not to let the bank know of the forgery. Wallace failed to make good his promises. From that time for nearly four months an active correspondence was carried

on between him and Ewing & Co., Wallace pleading for time to raise the money, and beseeching them not to notify the bank, and they urging him with threats and entreaties to retire the note as agreed. Wallace's efforts to extricate himself proved unavailing. On December 4, 1900, the bank again notified Ewing & Co. that the note would mature on December 17th, and would be obliged if they would kindly provide for the same. On December 10th, Ewing & Co. wrote the bank denying they were the makers of the note, and on the same day also notified Wallace that they had informed the bank to the like effect. Wallace left the country about the time the note matured. On suit brought by the bank, the defendants denied the making of the note, and the bank counter claimed that if the signature were a forgery they were estopped by their conduct from denying it.

The cause was tried in September, 1902, by Meredith, J., without a jury, and judgment passed for the plaintiff for the full amount of the note with interest amounting to $2,230, besides costs of action. The judgment did not proceed on the ground of ratification of the forged note by the defendants; but by reason of the defendants being estopped by their conduct from denying the making, the court holding it to be the legal duty of a person whose name has been forged to inform the holder of the forged instrument of the fact promptly after becoming aware of it; and that such a person becomes liable upon it if, by reason of neglect of such duty, the holder's position is altered for the worse.

On appeal to the Court of Appeal for Ontario, the judgment was unanimously sustained. The Court of Appeal held that the judgment could not be supported on the ground of ratification; on the other hand, it could rest only upon estoppel. Chief Justice Moss, after referring to the conduct of the defendants, in their attempt to shield Wallace, held that their silence for the benefit of the forger resulted in the bank's position being thereby materially altered to its prejudice, and that consequently the defendants were estopped from denying their liability upon the note.

In order to form a just conception of the import of this judgment it may here be stated that the evidence discloses that, when the forged note was presented for discount, the bank knew the Phosphate Co. was practically worthless; that the bank never had any previous dealings with the firm of Ewing & Co., had no knowledge of their signature, and made no inquiry as to the standing of the firm, or as to the genuineness of the signature, but acted entirely

upon the representation of Wallace; that the note was drawn on a Toronto form, notwithstanding the defendants resided in Montreal; that the note, apart from the printed portions, was filled up in two different handwritings, facts that would reasonably awaken suspicion; that the notice was not sent by the bank to Ewing & Co. to elicit a response as to the genuineness of the signature; and that the fact that they did not receive an answer to the notice in no way influenced the bank as to the disposition of the balance of the funds in their hands.

The counsel on behalf of the appellants contended, that they were entitled to a reasonable amount of time to make inquiries in order to satisfy themselves a forgery had been committed, and no duty to speak was cast upon them until assured of its commission; that when such knowledge was obtained by the confession of the forger on August 19th, the proceeds of the note had been substantially withdrawn; and that by the silence of the defendants after the 19th the position of the bank had not been materially altered for the worse. On behalf of the bank it was contended there was evidence to show that prompt notice would have enabled the bank, by refusing payment of the forger's checks, to have retained a part at least of the proceeds of the note, as well as other moneys afterwards withdrawn by the forger, and want of such notice prevented the bank from taking civil or criminal action or other course against the forger before he absconded.

The judgment of the Court of Appeal of Ontario was affirmed by the Court of Appeal for the Dominion of Canada, two judges dissenting.[1] Mr. Justice Nesbitt in his dissenting opinion, after concluding that in order to create a duty on the part of Ewing & Co. to notify the bank that the note was not theirs, the bank should have given some reason to Ewing & Co. to suppose that it would be prejudiced by their silence, proceeds:

"I think, that, in any event, until the interview on Sunday the 19th Ewing & Co. were not bound to assume a crime had been committed and that their explanation, which was adopted by the Court of Appeal, that, although they had not made a note, the slip by mistake or error on the part of the clerk in the bank might refer to an advice of a draft intended to be drawn upon them, was reasonable, and they were not bound to suppose a crime had been committed; and Wallace's telegram would certainly lead them to suppose he had a reasonable explanation and that they were justified in waiting until Sunday the 19th, and at that time any telegram or other

[1] See Ewing *v.* Dominion Bank, *supra*.

notice at the bank would have been quite ineffective. It was not pretended that the bank was in any worse position as to arrest by not receiving notice until the 10th of December. . . . It seems to me that even the extreme altruistic view referred to by Mr. Ewart in his work on Estoppel, page 38, does not justify a court in making a man pay a note which he did not sign when the person who discounted the note relied entirely for the genuineness of the signature upon the representation of the party discounting it and did not communicate, in any way intending or relying upon such communication, with the party sought to be charged."

The counter view of the case was briefly expressed in the following terms by Mr. Justice Killam:

"The case appears to me to come directly within the principle upon which silence under certain circumstances gives rise to an estoppel. The bank directly notified the defendants that their note would fall due at its office on a certain date and requested them to provide for the same. This distinctly implied that the bank had an interest, either of its own or on behalf of some one else, in the payment of the note and in its genuineness. While there was no intimation that the bank had acquired or was proposing to acquire the note for value, the defendants, as men of business, would know that the bank might have discounted the note and have the proceeds still at the customer's credit, or that it might make advances upon it. They would know that an immediate repudiation would enable the bank to withhold payment of any portion of the proceeds not actually paid out or of any sums not already advanced. They knew that they had made no such note, that they had given no authority for the signature. They could at once repudiate it, and they did so in their telegram to Mr. Wallace. No further information was necessary for that purpose. While the bank manager placed the proceeds to the credit of the customer without inquiry, and took no precaution against their being paid out before he could hear from the defendants, the bank did act upon the defendants' silence in the sense that it did what, it should properly be inferred, it would not have done if the defendants had at once denied the signature; it allowed the balance of the proceeds to be withdrawn."

Special leave to appeal, from the Supreme Court of Canada, to His Majesty in Council was asked and refused. So here ends the case. *Curia summa locuta est; causa finita est.* And who can say strict justice has been done? The case seems a particularly hard one for the defendants. They were brought, not by their own seeking or concurrence, into unpleasant relationship with a bank and one of its customers. When the notice referred to reached them, on the morning of the 16th of August, the damage

complained of had in part been done. When, on the 19th of August, they first learned from the lips of Wallace that their signature to the note in question had been forged by him, the whole damage had been done. And yet, in consequence of subsequent silence, they were compelled to pay the note in full, and thus make full reparation for the entire damage.

As the damages assessed by the trial judge were neither exemplary nor punitive, as in actions for deceit or misrepresentation, the judgment can be defended only on the ground of the application of a rigorous rule of evidence, which excludes a finding of the actual loss sustained by the plaintiff, and places the person relying on the estoppel in a better position than that which his own initiative materially assisted in generating. In fine, an estoppel goes to the extent of preventing an adjustment of the damage actually incurred or of ascertaining in how much worse condition the plaintiff has been placed by reason of the conduct of the one sought to be estopped. Against such technical injustice able judges have from time to time entered a vigorous protest; notably Lord Justice James, in his judgment in *In re* Collie.[1] The learned editors of Smith's Leading Cases hold with much show of reason, that it savors of injustice to allow the position of the person relying on the estoppel to be made better by the act of the estopped, simply on the ground he is precluded, by a not very well defined rule of evidence, from stating the real truth of the case. It would seem strict justice should rather demand, that the plaintiff should be relegated simply to the same position he would have occupied, had he not acted upon the representation or act complained of. It is to be hoped, however, notwithstanding that the more rigorous doctrine still prevails, that in the language of the editors referred to, in the closing words of their comments on the Duchess of Kingston's case — "Possibly the greater flexibility introduced into our system by the Judicature Acts may eventually lead to an alteration in this respect."

Silas Alward.

St. John, N. B.

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[1] 8 Ch. D. 816.